# STATE OF MICHIGAN

# COURT OF APPEALS

JON JENKINS,

Plaintiff-Appellee,

v

CHARLES KOESTER,

Defendant,

and

FARM BUREAU INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
August 28, 2007

No. 268175
Genesee Circuit Court
LC No. 04-078388-NI

Before: Davis, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Defendant Farm Bureau Insurance Company appeals by right from an order of the circuit court determining coverage under a homeowner's insurance policy issued by defendant insurance company. Earlier, the court had entered an order denying defendant insurance company's motion for summary disposition under MCR 2.116(C)(10). Plaintiff was injured when he was struck in the right eye by a paintball discharged from defendant Charles Koester's paintball gun. Koester is not a party to this appeal. We affirm.

Koester is the insured on a homeowner's policy issued by defendant Farm Bureau. Koester submitted a claim on the policy arising from an incident in which Koester shot plaintiff Jon Jenkins with a paintball gun. Koester had no prior experience with any guns other than a BB gun as a child; plaintiff explained to Koester the paintball gun's trigger and automatic firing operation. The two men went outside to find a place for plaintiff to show Koester how to operate the gun. Both men were wearing helmets with eye protectors, but their visors were flipped up.[1]

[1] It is not clear whether Koester knew that plaintiff's visor was not in place.

Plaintiff was approximately ten to fifteen feet in front of Koester, when Koester began "horsing around" and fired his paintball gun in plaintiff's direction. Koester pulled the trigger once, sending several paintballs toward plaintiff. Plaintiff heard shots and turned to see what Koester was shooting at, and one of the paintballs struck plaintiff in the eye, causing permanent injury. Farm Bureau denied coverage on two grounds: that the incident was not a covered occurrence, and that the incident arose from an intentional act that the policy excluded from coverage.

The issues in this appeal turn on the interpretation of the applicable insurance policy. When construing an insurance policy, this Court must enforce the policy terms. *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 111; 595 NW2d 832 (1999), citing *Upjohn Co v New Hampshire Ins Co*, 438 Mich 197, 207; 496 NW2d 392 (1991). Unless the terms in the policy are ambiguous, the Court will enforce the policy as written. *Id.* Clear insurance policy exclusions are strictly enforced, and the goal of contractual interpretation is to effectuate the intent of the parties, but any construction necessary is to be strictly in the insured's favor. *Hayley v Allstate Ins Co*, 262 Mich App 571, 574; 686 NW2d 273 (2004). The Court addresses coverage issues before deciding whether any exclusions negate coverage. *Auto-Owners Ins Co v Harrington*, 455 Mich 377, 382; 565 NW2d 839 (1997).

The coverage issue is whether the shooting was an "occurrence" within the meaning of the policy. The trial court correctly determined that the incident was a covered occurrence.

The policy covered "occurrences," defined in relevant part as accidents resulting in bodily injury "neither expected nor intended from the standpoint of the insured." Our Supreme Court has explained that as a general matter, "[a]ccidents are evaluated from the standpoint of the insured, not the injured party." *Allstate Ins Co v McCarn*, 466 Mich 277, 282-283; 645 NW2d 20 (2002). If the act was intentional but the resulting injury was not, the injury is an "accident" unless the consequences should have been expected by the insured. *Id.* In the absence of a policy provision to the contrary, that expectation is also analyzed subjectively. *Id.* Here, the policy does not mandate an objective analysis. Indeed, the language "neither expected nor intended from the standpoint of the insured" indicates a concern with *actual*, and therefore subjective, expectations. Koester unequivocally testified that he neither expected nor intended to injure plaintiff, and furthermore he did not know that a paintball would be capable of causing that much eye injury. The shooting was an accident within the meaning of the policy's coverage provision.

The second question is whether the shooting is nevertheless excluded from coverage under the policy's intentional-act exclusion provision. Again, the trial court correctly found that the exclusion provision did not apply.

The policy exclusion in this case applies to:

> bodily injury or property damage which may be the natural foreseeable, expected, or anticipated result of the intentional acts of one or more insureds or which in fact is intended by one or more insureds, even if the resulting bodily injury or property damage is of a different kind, quality, or degree than initially intended, or is sustained by a different person, entity, or real or personal property than initially expected or intended.

The policy exclusion therefore applies to *predictable or intended* consequences of *intentional acts*. The "result" here is plaintiff's eye injury. Two facts are established: first, that the act of pulling the trigger of the paintball gun and shooting paintballs in plaintiff's general direction was intentional; and second, the eye injury was not "in fact" intended. Therefore, at issue is whether plaintiff's injuries were "the natural, foreseeable, expected, or anticipated result" of the shooting.

We first observe that this policy provision contains several different internal analyses. Significantly, "damage . . . of a different kind, quality, or degree" applies only to intentional harms. This language is explicitly in reference to "than initially intended," and logically modifies "or which in fact is intended." This can be contrasted against damage "sustained by a different person, entity, or real or personal property than initially *expected or* intended" (emphasis added). In other words, the exclusion provision operates differently depending on whether the injury was "intended" or "expected." If someone or something unexpected is harmed, but the kind of injury was expected, the policy exclusion applies. If a different kind or degree of harm is sustained, the harm must have been *intended*. Therefore, because it is established that Koester did not actually intend to cause any injury to plaintiff, it is not sufficient that some generalized injury have been expected; rather, permanent eye injury must have been expected.

The remainder of the analysis depends on whether "expected," clearly referring to the "forseeable, expected, or anticipated" nature of the harm, should be analyzed objectively or subjectively. Our analysis of the case law leads us to the conclusion that, in the absence of explicit instructions in the policy itself, the standard is essentially subjective, but tempered by a determination of whether the insured's subjective expectations are so absurd and unrealistic that they cannot possibly be taken seriously.

We first contrast the instant case with another bearing some similarities. In *Allstate Ins Co v Maloney*, 174 Mich App 263, 267; 435 NW2d 448 (1988), a person intentionally fired a shotgun, without evidence of intent to hit or injure anyone, and a panel of this Court concluded that it was reasonable to expect the resulting injury. This Court then determined that the shooting was therefore excluded under the insurance policy at issue. The significant difference between the instant case and *Maloney* is that the policy exclusion in that case was for intentional injuries or for injuries "which may *reasonably* be expected to result..." *Id*. at 265 (emphasis added). The policy exclusion at issue in that case therefore explicitly contained an objective standard. No such explicit instruction is found in the instant policy provision. We also note that the potential for damage from a shotgun pattern covers a greater area than the potential for damage from a paintball gun, and shotgun ordinance is inherently intended to cause more damage.

The *Maloney* Court relied on *State Farm Fire & Cas Co v Jenkins*, 147 Mich App 462; 382 NW2d 796 (1985), in which Grasfeder placed explosives in Jenkins' car at the request of Jenkins' wife, with whom Grasfeder was apparently involved in a relationship. Jenkins was killed, and Grasfeder pleaded guilty to second-degree murder, although Grasfeder contended that he did so only to avoid facing trial for first-degree murder. Grasfeder asserted that he did not intend or expect to kill Jenkins. At issue was whether a homeowners' insurance policy exception applied. This Court quoted the exception as applying to "'[b]odily *injury* or property damage which is *expected or intended* by the insured * * *.'" *Id*. at 466 (emphasis added by the *Jenkins* panel). The *Jenkins* panel mostly explained that "expected" and "intended" are not synonyms.

This Court also explained that "expected injury" meant "that the injury was the natural, foreseeable, expected, and anticipatory result of an intentional act." *Id*. at 468. Most importantly, this Court then went on to conclude that the injury *was in fact expected*, and that the "guilty plea to second-degree murder is dispositive." *Id*. The panel did note that "one who commits an act that has a natural tendency to cause death or great bodily harm can reasonably expect those results to ensue from commission of the act." *Id*. In context, this was merely additional support for finding that Grasfeder *actually* expected the explosives to kill Jenkins. The policy provision was concerned with *actual* expectations or intentions, and this Court used objective facts to help determine those actual expectations.

Most important to the instant matter is *Auto-Owners Ins Co v Harrington*, 455 Mich 377, 383-384; 565 NW2d 839 (1997). In *Harrington*, our Supreme Court explained precisely that a policy exclusion for "expected" injury requires an inquiry into the actual state of mind of the insured, but "'coverage is precluded if the insured's claim that he did not intend or expect the injury "flies in the face of all reason, common sense and experience."'" *Harrington*, *supra* at 384 (quotations and citations omitted). In other words, the courts' analysis of "expected" injuries entails a determination of the *actual expectations* of the insured – which is therefore a subjective analysis. The courts will not write an objectivity requirement into an insurance policy if the parties thereto did not see fit to include one themselves. However, the courts do not necessarily merely take the insured's word for it. The test remains subjective unless otherwise specified, but there may be circumstances under which an individual's protestation that he or she did not think the injury would result is simply so ridiculous that it cannot be given credence. This is merely a matter of using objective evidence to help determine a party's subjective mental state.[2]

The question before us is therefore twofold. First, did the insured *actually* foresee, expect, or anticipate that plaintiff would sustain an eye injury? Second, was the eye injury so overwhelmingly and obviously likely to occur under the circumstances that the insured's claims that he did not foresee, expect, or anticipate the eye injury "fly in the face of all reason, common sense, and experience?"

The facts of this case show that Koester did not actually expect that he would cause plaintiff *any* injury, let alone a permanent eye injury. Furthermore, plaintiff was in front of Koester and facing away from Koester, so plaintiff's eyes were not in the line of fire. Plaintiff was wearing a helmet with eye protection, although Koester may have known that the visor was

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[2] A similar approach was taken in *Homeowners Ins Co v Tolley*, unpublished opinion per curiam of the Court of Appeals, issued March 22, 2007 (Docket No. 271322). There, a teenager intentionally fired a paintball gun at someone, and this Court concluded that, under the circumstances, it was absurd to believe the teenager's claims that she did not think she would hit the injured party. As was the case in *Jenkins*, the teenager had pleaded guilty to aggravated assault, which necessarily meant that she had intended to cause injury or place the injured person in fear of injury. This Court found the plea not dispositive, but it noted that the proper test was *subjective*, albeit a subjective test that would reject a claim that the insured did not expect a given result if that claim is sufficiently ridiculous.

not in place. The very close range suggests a high likelihood of more severe injury if an accident were to occur, but it also suggests a much greater degree of control over whether someone could avoid striking a given target. Under the facts of this case, Koester's failure to anticipate, expect, or foresee an eye injury to plaintiff is not so unrealistic that it "flies in the face of all reason, common sense, and experience." The insurance policy exclusion therefore does not apply.

Affirmed.

/s/ Alton T. Davis
/s/ Stephen L. Borrello